No. 12446

United States
Court of Appeals
for the Ninth Circuit.

H. W. SMITH, doing business as A-1 Photo Service,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition For Review of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

EUGENE M. PURVER, ESQ.,
For the General Counsel.

ALEXANDER H. SCHULLMAN, ESQ.,
Los Angeles, Calif.

MORRIS J. POLLACK, ESQ.,
Los Angeles, Calif.,
Appearing Specially for the Respondents.

GIBSON, DUNN AND CRUTCHER,
By JOHN BINKLEY, ESQ.,
Los Angeles, Calif.,
For the Employer.

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Washington, D. C.

Case No. 21-CB-34

In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, SECRETARY-TREASURER, AND ALBERT E. MORGAN, BUSINESS AGENT

and

H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

INTERMEDIATE REPORT

Statement of the Case

Upon an amended charge dated April 5, 1948, filed by H. W. Smith, doing business as A-1 Photo Service, San Pedro, California, herein called the Employer, the General Counsel of the National Labor Relations Board,[1] by the acting Regional Director for the Twenty-first Region (Los Angeles, California), issued a complaint dated April 7, 1948, against Local 905 of the Retail Clerks International Association (AFL), Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent,

[1]The General Counsel and the attorney appearing as his representative at the hearing are referred to herein as the General Counsel; the National Labor Relations Board, as the Board.

herein called the Respondents, alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A), (2) and (3), and Section 2 (6) and (7) of the Labor Management Relations Act, 1947,[2] herein called the Act. Copies of the complaint, amended charge, and notices of hearing, were duly served upon the Respondents and the Employer.

With respect to the unfair labor practices, the complaint alleges in substance that:

1. The Employer, who is engaged in the business of photo finishing and the sale of photographic equipment and supplies, causes a substantial amount of such merchandise to be transported and delivered to him in interstate commerce, and likewise causes quantities of his finished products to be transported to his customers in interstate commerce, and is therefore engaged in commerce within the meaning of the Act;

2. Since before November 1, 1947, the Respondent Union has been the duly designated collective bargaining representative of the Employer's clerical employees, who constitute a unit appropriate for the purposes of collective bargaining;

3. Although duly requested by the Employer, the Respondent Union has at all times since November 1, 1947, refused to bargain collectively in good faith with the Employer;

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[2]The National Labor Relations Act, 49 Stat. 449, as amended by Public Law 101, Chapter 120, 80th Congress, First Session (61 Stat. 136).

4. The Respondent Union, and its officers, agents, organizers, and representatives, including Respondents Tidwell and Morgan, have since November 1, 1947, restrained and coerced employees of the Employer by: (a) refusing to bargain collectively with the Employer in good faith; (b) attempting to impose and imposing upon such employees requirements that they obtain and maintain membership in the Respondent Union as a condition of employment;

5. The Respondents have since November 1, 1947, attempted to cause the Employer to discriminate against his employees by insisting and seeking to compel the Employer to establish and maintain a closed shop;

6. By the aforesaid acts the Respondents have engaged and are engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A), (b) (2) and (b) (3) of the Act.

The Respondents did not file an answer to the complaint. Pursuant to notice, a hearing was held at Los Angeles, California, on April 21, May 3, and May 4, 1948, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. All parties were represented by counsel, were afforded full opportunity to participate in the hearing, to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. The Respondents appeared specially through counsel, who, at the opening of the hearing, filed a written motion, supported by a memorandum of

law, to dismiss the complaint on the grounds that since, as Respondents contend, the Employer is not engaged in commerce within the meaning of the Act, the Board has no jurisdiction over the Respondents or the subject matter herein involved; and that the Act is unconstitutional, being in derogation of the First, Fourth, Fifth, Tenth, Thirteenth, and Fourteenth Amendments to the Constitution of the United States. Insofar as the motion to dismiss was founded on the asserted lack of jurisdiction of the Board, it was denied with leave to renew it after introduction into evidence of the General Counsel's case with respect to the business operations of the Employer. Insofar as the motion to dismiss was based on the asserted unconstitutionality of the Act, the undersigned stated for the record that as agent of an administrative agency, he would conform to the Board's policy of assuming the constitutionality of the Act.[3] The motion to dismiss was, therefore, denied. The undersigned also denied motions to strike certain paragraphs of the complaint, made by counsel for the Respondents on the ground that the said paragraphs stated merely conclusions of law.

A demand for a bill of particulars submitted orally by counsel for the Respondents was granted in part. Pursuant to such ruling, the General Counsel furnished the additional information ordered, on the record.

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[3]See Matter of Rite-Form Corset Co., Inc., 75 N.L.R.B. 174.

Before the completion of the General Counsel's case with respect to the interstate commerce aspects of the business of the Employer, counsel for the Respondents, on behalf of his clients, withdrew from further participation in the hearing, after making a statement for the record setting forth his reasons for doing so.[4] Thereafter the hearing proceeded to its conclusion in the absence of the Respondents and their representatives.

Before closing the hearing, the undersigned granted a motion of the General Counsel to conform the pleadings to the proof with respect to such formal matters as the spelling of names, dates, and the like. A motion by the General Counsel to dismiss the complaint with respect to Albert E. Morgan as a party Respondent was granted without objection.[5] All parties present having been afforded opportunity at the close of the hearing to be heard

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[4]Respondents' counsel asserted that since "this Board patently . . . has no jurisdiction" because "this is purely and exclusively and admittedly a retail store, having three employees . . ., it appears there would be no purpose served on the part of Respondents to continue this hearing any further, having reserved their right to objections and to a copy of the transcript, and to file, if necessary, at the time, as it may occur, any objection to the intermediate report . . ."

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[5]Since, as above described, the complaint has been dismissed insofar as it joins Morgan as a party Respondent, the undersigned will hereinafter refer to the Union and the Respondent Tidwell as "the Respondents."

in oral argument, the General Counsel was so heard. The undersigned allowed all parties 15 days from the closing date of the hearing within which to submit briefs and proposed findings of fact and conclusions of law. Counsel for the employer has filed a brief and proposed conclusions of law.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact[6]

I. The Business of the Employer

Henry Wilbert Smith, the Employer and charging party herein, is the sole proprietor of a retail photographic supplies store located in San Pedro, California, which he operates under the assumed name and style of A-1 Photo Service. He is engaged, in this business, in buying, and selling at retail, photographic equipment and supplies, greeting cards, and stationery. During the period from April, 1947, through March, 1948, both inclusive, the Employer

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[6]Since the Respondents withdrew from the hearing shortly after the General Counsel began to introduce evidence in support of the allegations of the complaint, the findings of fact herein made are based on evidence standing undenied in the record. From the statement made by counsel for the Respondents at the time they withdrew from further participation in the hearing, and from the motion to dismiss the complaint filed on their behalf before their withdrawal, it would appear that they base their defense solely on their contentions: 1. That the Act is unconstitutional, and 2. That the Board lacks jurisdiction over the parties and the subject matter.

purchased merchandise for his aforesaid business, of a value of $100,146.69. Of this amount, merchandise of a value of $44,406.63 was purchased from wholesalers located outside the State of California, and delivered to the Employer's aforesaid store in San Pedro, by mail or common carrier, from states of the United States other than the State of California. The rest of the merchandise purchased by and delivered to the employer during the same period, of a value of $55,740.06, was purchased from sellers located in the State of California. Most of the merchandise so purchased from establishments in the State of California, was delivered to the employer from within the said State. A small proportion, however, although ordered from local jobbers or local branch offices of national companies, was shipped to the Employer's store from points outside California. Of the merchandise delivered to the Employer by local wholesale dealers from within California, a substantial proportion originates, i.e., is shipped to the local suppliers, from outside the State of California.[7]

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[7]The above finding is based on the testimony of the Employer, Smith, and on that of Sunderman, purchasing agent of one of the Employer's local suppliers. Smith "estimated," on the basis of his experience in the photographic equipment business, that approximately 90 per cent of the merchandise sold and delivered to him locally, was received by his local suppliers from factories located outside of California. He testified that this estimate was based upon statements made to him by some of his local suppliers, as to the origin of the merchandise they

During the calendar year 1947, the Employer's sales at his San Pedro store totaled $133,715.51. The total of his sales for the period from April, 1947, through March, 1948, was approximately the same. The Employer's aforesaid annual sales consisted entirely of merchandise sold and delivered to retail customers within the State of California ex-

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sold to him, and the fact that to his knowledge, some of the manufacturers of the merchandise sold to him by local dealers, had plants located exclusively in States other than California. Were this the only evidence in the record as to the origin of the merchandise in question, the undersigned would be dubious as to its probative value. However, Sunderman, purchasing agent for Craig Movie Supply Co., one of the local wholesalers selling merchandise to Smith, testified in convincing detail, on the basis of records, that Smith purchased from Craig during the year, merchandise comprising a "rough cross section of [Craig's] entire line," and that approximately 90 per cent of the merchandise handled by Craig is shipped to it from outside the State of California. Since Sunderman's testimony, which was based on first-hand knowledge of Smith's and Craig's purchases, corroborated Smith's testimony, the undersigned is persuaded that sufficient basis is afforded by the record to support the finding made above. There was no specific corroboration of Smith's estimate with respect to the origin of the merchandise purchased locally from suppliers other than Craig; therefore the undersigned does not feel that he can make a finding as to the percentage of such locally purchased merchandise which originated outside of California. It is a fair conclusion, however, from the evidence as a whole, that a substantial proportion of all of the merchandise purchased by and delivered locally to Smith, was shipped from points outside the State of California to the California wholesalers who sold it to Smith.

cept merchandise valued at approximately $600, which was delivered to customers outside that State, and merchandise valued at approximately $2400, sold and delivered to installations of the United States Army and Navy.

The Respondents contest the jurisdiction of the Board on the asserted ground that the Employer is not engaged in commerce within the meaning of the Act. Their argument is, in brief, that the business operated by the Employer is purely a local, retail enterprise, employing only three clerks,[8] and that a labor dispute involving his employees would not have such a direct and substantial effect upon interstate commerce as to be cognizable under the Act.

The Employer, in the course of his business operations, regularly receives a substantial volume of merchandise, comprising about 44 per cent of his total purchases, directly through the channels of interstate commerce. In addition, a substantial proportion of the merchandise delivered to him from points within the State of California originates from outside that State. It is too well-settled to require citation of authority that the operation of such a business involves and affects interstate commerce to such an extent as to bring it under the jurisdiction of the Board. On occasion the Board has declined to exercise its jurisdiction over retail

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[8]Smith testified without denial, and the undersigned finds, that he regularly employs three clerks at his San Pedro store, sometimes, during certain rush periods, adding a fourth clerk to his sales staff.

enterprises similar to that of the Employer, but such action has been based on policy considerations not properly within the province of the undersigned. The sole issue confronting the undersigned is whether the Board has jurisdiction over the case at bar, not whether, as a matter of public policy, it should assert it.

It is found that the Employer, H. W. Smith, doing business as A-1 Photo Service, is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

Local 905 of the Retail Clerks International Association (AFL), is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. History of bargaining between the Employer and the Respondent Union

The Employer hired the first clerk for his San Pedro store during the latter part of 1944. Informed by the clerk that she was a member of the Respondent Union (hereinafter called the Union), the Employer signed a collective bargaining contract with that organization, covering the clerk's wages, hours, and working conditions. Shortly before the expiration of the aforesaid contract on January 31, 1945, the Employer joined the San Pedro Business Men Associated, Inc. (hereinafter called the Associated), which, as its name implies, is an organization composed of business men of the San Pedro area, and which, among other activities,

bargains collectively with the Union on behalf of those of its members who employ clerical workers. The Associated negotiated a master-contract with the Union, which was effective for a year beginning February 1, 1945, and the Employer became a party thereto by ratifying it. Thereafter the Employer, through his bargaining representative, the Associated, entered into contracts with the Union from year to year, the last such contract becoming effective on February 3, 1947, for a term expiring January 31, 1948. Shortly after entering into his second contract with the Union in February, 1945, the Employer hired an additional clerk; about a year later, he employed a third clerk. Since then, he has continuously had three clerks in his employ at his San Pedro store. During periods of increased business such as occur at the Christmas season and during the summer months, he temporarily adds an extra clerk to his sales staff. Included in all the aforesaid contracts to which the Employer and the Union have been parties, were clauses providing that the Employer "employ only members in good standing with" the Union, and that "after a new employee is hired and prior to going to work, said employee shall obtain a Clearance Card from the office of the Union immediately." Pursuant to such contracts, the Employer has, since 1944, hired as clerks only members of the Union, who submitted to him a "clearance card" issued by the Union, indicating that the new employee was a member of, and approved by, the Union for employment in the Employer's store.

B. Bargaining between the parties since the effective date of the Labor Management Relations Act, 1947

Certain provisions of the Labor Management Relations Act, 1947, amending the preceding National Labor Relations Act, went into effect on August 22, 1947.[9] Among other changes effected by these amendments, is one making the "closed shop" illegal.

The last contract in effect between the Union and the employers represented by the Associated provided that it was to "continue until January 31, 1948, and from year to year thereafter, subject to alteration or amendment by written notice given by either party thirty days prior to each January 31st." The contract also embodied clauses reading as follows:

> 1. After a new employee is hired and prior to going to work, said employee shall obtain a Clearance Card from the office of the Union immediately.
>
> 2. The [Employer] agrees to employ only members in good standing with [the Union].

In a letter dated November 29, 1947, and delivered by registered mail on December 1, 1947, the Associated notified the Union that it did not desire

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[9]The new Act was enacted on June 23, 1947. Pursuant to Section 104 thereof, the amendments contained in Section 8 (a) (3), and 8 (b) (1), (2), and (3), which are involved in this proceeding, became effective 60 days thereafter.

to renew, alter, or amend the aforesaid contract, but that it did desire that the agreement terminate by its terms "as of midnight January 30, 1948." The letter also informed the Union that the Associated had been designated as collective bargaining representative of the employer-parties to the contract, for the purpose of "meeting, conferring, and negotiating a new contract with representatives of your union at reasonable times on and after December 1, 1947." The Associated never received an answer to the aforesaid letter. A few days later, however, on or about December 3rd, Smith and other employers represented by the Associated[10] received mimeographed letters, addressed to "Business Men and Women of the Harbor District," and bearing

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[10]There is in evidence an authorization card dated December 4, 1947, signed by Smith and delivered by him to the Associated, wherein he designates the Associated as his representative "for the purpose of meeting, conferring and negotiating a new contract with the representatives of Local 905 at reasonable times hereafter; provided that any negotiations or agreements between [the parties] shall not be binding on the undersigned Employer until such time as the Employer shall have ratified and signed the agreement."

The above authorization card was apparently signed in order to extend the Associated's authority to represent the Employer, which, as is apparent from the findings heretofore made, it possessed since the latter part of 1944. The undersigned finds that at all times material herein, the Associated was the duly designated collective bargaining representative of the Employer, with authority to negotiate on his behalf, subject to his ratification, collective bargaining contracts with the Union.

the typed signature of Respondent Tidwell, as secretary of the Union, appealing to the employers to "reconsider the action" taken by the Associated, and to "withdraw the notice of termination of our working agreement and to continue for another year the present agreement that we have." The letter also stated that the members of the Union had "voted unanimously at their last meeting not to ask for any increase or to make any change in the present working agreement for another year." It went on to say that the attorneys for the Associated had advised "many of the business men that the present contract is a violation of the Taft-Hartley Law," but that "this is not true. Any attorney who is not looking for business will tell you that the National Labor Relations Board has never taken jurisdiction over any retail establishment, except very large stores that are engaged in interstate commerce." The letter predicted that "if these lawyers are going to talk the Business Men into reopening the contract, an economic struggle which will be disastrous to the community will develop . . ."

On December 5, 1947, the Associated mailed a proposed new contract to the Union, and in a covering letter requested the Union to set a date for a meeting with the negotiating committee and attorneys of the Associated,[11] for the purpose of nego-

[11]The negotiating committee of the Associated consisted of H. W. Smith, the charging Employer herein, W. T. Grace, and President B. M. Malone of the Associated. Its legal counsel were the same as those appearing for the Employer at the hearing.

tiating a new agreement. Pursuant to arrangements made over the telephone between President Malone of the Associated and Secretary-Treasurer Tidwell of the Union, Tidwell appeared at the offices of the Associated on December 9, 1947, where the negotiating committee of the Asociated and its attorneys were waiting to meet with him. Tidwell met the acting secretary of the Associated in an outer office, and asked to see Malone. Malone, and Neary, one of the Associated attorneys, left the inner office, in which the representatives of the Associated were gathered, and after some time returned to the group and announced that Tidwell had left, refusing to meet with them because of the presence of the attorneys.

In a letter addressed to Tidwell as secretary of the Union, dated December 10, 1947, the Associated reiterated its request for a meeting to negotiate an agreement. No answer was received by the Associated to this letter.

On December 31, 1947, the Associated mailed a letter to the Director of the Federal Mediation and Conciliation Service, notifying him, pursuant to the requirements of Section 8 (d) (3) of the Act, that a dispute existed between itself and the Union, arising out of "the failure and/or refusal of the Union to bargain collectively with the [Associated] who are the duly authorized collective bargaining representatives of approximately 67 retail stores in San Pedro, Wilmington and Torrance." A copy of this letter was mailed to the Union.

On January 20, 1948, for the first time since the Associated had requested conferences to discuss a new contract for 1948, committees representing the Union and the Associated met. Present for the Union were Tidwell and two other representatives. Attorneys Neary and Binkley, and several members of the negotiating committee of the Associated, excluding Smith, represented the latter organization. Neary outlined the proposals of the Associated with respect to a new contract, taking the position that the employers could not renew the agreement then in effect as was demanded by the Union because it contained a closed shop provision. Neary also proposed that the new agreement include an arbitration clause. To this Tidwell replied that "under no circumstances would he change one comma, one period, or one word in the contract as it had existed from 1947 to 1948." A discussion ensued during which Neary suggested that the first two paragraphs of the 1947 contract (which have been set forth above) might possibly be interpreted as constituting "union shop" rather than "closed shop" provisions—especially in view of the language of the first paragraph—and that if so interpreted, such a provision "would be permitted under the Labor Management Act." Tidwell objected to any such interpretation, stating that "no employer in San Pedro is going to hire any employees except members of my union. And they haven't hired any except members of my union." Neary then asserted that on occasion, when employers had sought to hire

extra help for rush periods, the Union had refused to issue clearance cards to non-union members who had been offered such employment, and who had applied for membership in the Union, in order to become eligible to accept the offered employment. Tidwell admitted that this was true, explaining that the Union would not accept new members so long as existing members were not employed. In response, Neary contended that this constituted a "closed union," and that "a closed union together with a closed shop . . . was illegal under the laws of California."[12] Tidwell closed the discussion by remarking, "Mr. Neary, if you want to fight this out, you fight it out in the Courts with Mr. Schullman [counsel for the Union]. And I will fight it out with blood on the streets with the employers of San Pedro."

A week later, on January 27, 1948, the negotiating committee of the Associated (without its attorneys), met with Tidwell and two other representatives of the Union. On this occasion the representatives of

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[12]The findings as to the discussion at the above-described meeting are based on the credited testimony of Attorney Binkley, which was corroborated by that of the witness Grace. In his brief, counsel for the Employer urges that a finding be made that the Union is a "closed union," in violation of Section 8 (b) (2) of the Act. The undersigned makes no such finding, since he does not deem that issue to have been raised by the complaint or to have been litigated at the hearing. In any event, the evidence in the record is not viewed by the undersigned as sufficient upon which to base a finding.

the Associated again requested that the closed-shop clause of the old contract be eliminated, and that the new contract contain provisions for arbitration and a no-strike guarantee. Tidwell offered to enter into a contract with the Associated on the latter's own terms, on condition that the Associated persuade the management of certain J. C. Penney stores, formerly operated in San Pedro and nearby towns, to reopen its said stores, and to observe union conditions with respect to the clerks employed therein. As an alternative, Tidwell proposed, the Union would make the aforesaid concession with respect to a new contract, if the Associated would publish a statement in a newspaper denouncing the Penney management for refusing to pay the union wage scale.[13] After putting forward these proposals, Tidwell left, saying that if the Associated would comply with the aforesaid conditions, another meeting could be arranged to discuss a new contract. The Associated did not accede to the Union's aforesaid proposal with respect to the Penney Company.[14] The next day, Attorney Binkley had a telephone conversation with Tidwell, during which he asked Tidwell whether he was insisting that the employers renew the old contract without any changes. Tidwell answered that that was correct. Binkley then asked, "Wouldn't that leave us, then, with nothing

[13]The Penney Company was not a member of the Associated.

[14]The above findings are based on the credited testimony of Smith and Grace.

but a straight closed shop?" To this Tidwell replied, "I don't care what you call it." Binkley asked, "Will you modify that closed shop in any way if we can submit evidence to you that some of our employers are in interstate commerce?" Tidwell's answer to this was, "We won't modify a damn thing." The conversation closed with Binkley asking when the Union would be willing to "meet and negotiate further," and Tidwell answering, "We won't. We are through."[15]

On February 3, 1948, the negotiating committee and counsel for the Associated, and three representatives of the Union, including Tidwell, met with mediators representing the Federal Government and the State of California. At the suggestion of the Federal mediator, counsel for the Associated outlined the background of the dispute, indicating that the two points of difference between the parties were: (1) The Union's insistence on the retention of the closed-shop provision in the contract, and the employers' contention that this was prohibited by law; and (2) The proposal of the Associated that arbitration and no-strike clauses be added to the contract, and the Union's refusal to accept this proposal. Tidwell then spoke for the Union, asserting that he had never had trouble in the past in

[15]The above findings are based on Binkley's credited testimony; the detailed quotations were recollected by the witness with the aid of an affidavit with respect to the conversation, based on notes taken by him at the time the conversation took place.

reaching agreements with employers of the San Pedro area; that the Union had always been able to resolve disputes with employers without an arbitration provision; and that the closed-shop clause was a necessary protection for the membership of the Union, which he would not consent to eliminate. He concluded with the statement that the Union would make no change whatsoever in the old contract. When the mediator suggested that arrangements be made for further meetings, Tidwell said that he "would meet and meet and meet until hell freezes over, but that he would not make any changes in the old contract." The mediator then asked Tidwell to promise to refrain from taking any economic action against any employer represented by the Associated, in order to compel the employer to sign up individually with the Union. Tidwell refused to make any such promise, saying that he would take whatever action the members of the Union voted for. Tidwell then asked to be excused, and the meeting concluded.[16]

During the few days immediately preceding the above-described meeting with the mediators, namely on January 30, 31, and February 2, 1948, the charging Employer herein received telephone calls from Tidwell, in which the latter asked the Employer to sign for another year the contract which had just expired. The Employer told Tidwell that

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[16]The above findings are based on the credited testimony of Binkley, Smith, Grace, and DeLaney, whose recollections as to the discussion were in substantial agreement.

he had authorized the Associated to negotiate a contract for him, and that he would not individually sign an agreement with the Union. Tidwell argued that the old contract was not illegal, and that the Employer "Was practically the only one who had not signed it." The Employer stated that he had been advised by counsel that a closed-shop contract was illegal, and that he would not sign such a contract.[17]

On or about April 1, 1948, the Central Labor Council of San Pedro and Wilmington notified the Employer that at the request of the Union, it

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[17]Based on the credited testimony of Smith.

Charles E. Williams, operator of a furniture store in San Pedro, testified that although he is a member of the Associated, he was approached by Tidwell several times prior to the expiration of the 1947 contract, and was requested to sign a new contract with the Union as an individual employer. When Williams inquired why he was being asked to enter into an agreement by the Union prior to negotiations with the Associated, despite the fact that he had authorized that organization to bargain for him, Tidwell answered that "he was operating this year in a different manner," and that if Williams "didn't want any trouble," he "better sign it, because we never could reach an agreement through any lawyer that the [Associated] could employ." Williams finally acceded to Tidwell's demand, and on January 31, 1948, signed a contract with the Union, effective from February 1, 1948, to January 31, 1949, which contained identical terms as those incorporated in the preceding agreement. The undersigned credits Williams' testimony with respect to the foregoing, and finds that the incidents occurred as above summarized.

had placed the Employer's "firm on [its] official We Don't Patronize List."[18]

Since the events hereinabove summarized, the Union has requested no further collective bargaining conferences with the Associated or with the employer, and no such meetings between representatives of the parties have been held.[19]

C. Concluding Findings

1. The Refusal to Bargain

(a) The appropriate unit

The complaint alleges that "all clerical employees excluding supervisors employed by the Employer at his place of business in San Pedro, California, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act . . ." That allegation stands undenied in the record. Moreover, the evidence establishes, and the undersigned finds, that the only employees employed in the San Pedro store of the Employer

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[18]At a meeting of the Central Labor Council held on or about March 22, 1948, Secretary Tidwell of the Union had presented to the Council his organization's complaint that the Employer had refused to sign a contract with it, and counsel for the Employer had stated his client's version of the dispute. The findings with respect to this incident are based on the testimony of Smith and Binkley, and on communications from the Council to Smith, which are in evidence.

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[19]Based on the credited testimony of Smith and Binkley.

are three regular sales clerks, a fourth clerk added temporarily to the sales staff during seasonal rush periods, and a part-time public accountant. The Employer himself, and his wife, act as supervisors. Since 1944, when the Employer hired his first clerk, until the expiration of the contract between himself and the Union on January 31, 1948, he has been a party to collective bargaining contracts with that organization, covering the wages, hours, and working conditions of the clerks in his employ. These agreements, being in the form of master-contracts negotiated between the Associated and the Union, and to which the employers represented by the Associated became parties by their ratification thereof, did not describe the units in any of the enterprises covered by the contracts, but merely listed the classifications of employees so covered. Smith's testimony, however, makes it clear that it was understood between the parties that the unit consisted of the clerks in his employ at his San Pedro store. Since, so far as appears, the unit thus agreed upon satisfactorily served the parties as a basis for collective bargaining throughout the history of their relationship, the undersigned concludes and finds that all clerical employees, excluding supervisory employees and the public accountant employed on a part-time basis, by the Employer at his place of business in San Pedro, California, constitute, and at all times material herein constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

(b) Representation by the Union of a majority of employees in the appropriate unit

Smith testified that in accordance with the contracts between himself and the Union, he had never hired as clerks anyone except members of the Union, who presented to him a clearance card from that organization attesting to their membership therein. He testified further that so far as he knew all of the clerks in his employ were still members of the Union since none had ever indicated that he or she had withdrawn therefrom. The record thus makes it clear, and the undersigned finds, that at all times since November 1, 1947, the Union has been the duly designated representative of all of the employees in the appropriate unit above defined, and that, by virtue of Section 9 (a) of the Act, it has been and is now the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

(c) The Respondents' refusal to bargain, in violation of Section 8 (b) (3) of the Act

Section 8 (b) (3) of the Act makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9 (a)."

As appears from the findings hereinbefore made, the Employer, through the Associated, his duly designated collective bargaining representative, repeatedly requested the Union, which was the

collective bargaining representative of his employees in an appropriate unit, to bargain with him concerning a new contract to replace that expiring in January, 1948, and the Union through its agent, Tidwell, adamantly insisted that the old contract be renewed without any change whatsoever. The only occasion on which the Union indicated any willingness to reach an agreement not identical with the one previously in effect between the parties, was on January 27, 1948, when Tidwell stated that he would accept a contract on the Employers' terms, provided the Associated induce the J. C. Penney Company to pay the union scale of wages to its employees, or, in the alternative, publicly denounce the Penney Company for its refusal to do so. When the Associated refused to accede to this condition, the Union resumed, and thereafter unswervingly adhered to its position that it would sign no contract with the Employer except one incorporating the exact terms of the old one. The Employer was under no obligation to interfere in a labor dispute to which he was not a party, and the Union had no right to make such interference on his part a condition of reaching an agreement. By insisting that it would sign no contract which in any way departed from the terms of the preexisting agreement, the Union took the position that any contract negotiated between itself and the Employer must provide for a closed shop, for, as we have seen, such a clause was written into the previous contract, and was enforced by the parties. The issue arising from this posture of the facts is whether the unyielding

insistence on the part of the Union and its agent, Tidwell, that the Employer sign a closed-shop contract, constitutes, on their part, a refusal to bargain within the contemplation of Section 8 (b) (3) of the Act.

The General Counsel contends that since the Act prohibits a closed-shop contract, the Respondents' aforesaid conduct constituted a refusal to bargain in good faith. The undersigned finds it unnecessary to pass on the good faith of the Respondents. There is nothing in the record which casts doubt on the good faith of the Respondents in contending to the Employer throughout the negotiations between them, and before the undersigned at the hearing, that the business operated by the Employer is not engaged in commerce within the meaning of the Act, and that, therefore, the prohibitions of the Act do not apply to the relationship between the Union and the Employer. But the good faith of their belief that the Act has no application to the present controversy, affords the Respondents no defense. The Act outlaws the closed shop, and the Employer was therefore entitled to refuse to entertain any proposals from the Union providing for such an arrangement. As a corollary, the Union and its agent cannot be said to have been bargaining within the contemplation of the Act when they steadfastly refused to agree to any contract not containing that illegal provision. Although the Respondents based their insistence on a closed-shop contract, which is prohibited by the Act, on their assumption that the Employer's business operations are of such a nature

as to render inapplicable the prohibitions of the Act, they took the risk that this assumption was incorrect. That issue having been resolved against them, it follows that regardless of the bona fides of their belief, their conduct has constituted a violation of their statutory duty to bargain with the Employer. On the basis of the foregoing, and the entire record, the undersigned concludes and finds that on or about December 3, 1947,[20] and at all times since, the Union, and the Respondent Tidwell as its agent, refused, and have continued to refuse to bargain collectively with the Employer, as representatives of the latter's employees in an appropriate unit, in violation of Section 8 (b) (3) of the Act.[21]

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[20]On the above date, following the first request of the Associated that the Union negotiate a new agreement with it, the Union, through Tidwell, mailed letters to the employers represented by the Associated, taking the position that it wished to renew the old contract without any change.

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[21]Some question may be raised as to the propriety of the above finding with respect to the Respondent Tidwell. It might be argued that the Union, not Tidwell, bore the obligation to bargain, since it, not he, was the bargaining representative of the employees. Since no duty to bargain rested upon Tidwell, this line of reasoning would go, no finding may be made that he engaged in conduct violative of that duty. The record establishes that Tidwell was at all times herein material an officer, to wit, secretary, of the Union, and that he represented the Union in all its dealings with the Employer. His role as agent of the Union is thus beyond question. It was through Tidwell that the Union engaged in the conduct which constituted the refusal to bargain. Tidwell's conduct as agent of the

(d) Alleged restraint and coercion of the Employer's employees by the Respondents, in violation of Section 8 (b) (1) (A)

The complaint alleges that by "refusing to bargain collectively in good faith with the Employer . . . [and] attempting to impose and imposing upon employees of the Employer certain conditions of employment requiring said employees as a condition of employment to obtain and maintain membership in [the Union] in contravention of the Act," the Respondents, in violation of Section 8 (b) (1) (A) of the Act, restrained and coerced the said employees in the exercise of the rights guaranteed in Section 7. The latter section reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual

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Union, was, in other words, violative of the Union's duty to bargain. The undersigned is persuaded that in undertaking the role of agent of the Union, Tidwell assumed the obligation resting upon his principal to bargain collectively with the Employer. The language of the Act seems to answer in the affirmative the question whether an agent of a labor organization may be held answerable for acts committed by him in his representative capacity. Section 8 (b) reads: "It shall be an unfair labor practice for a labor organization or its agents [to engage in the conduct thereinafter defined]." (Underlineation supplied.)

aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

It is the contention of the General Counsel that the conduct of the Respondents which has been found to constitute a refusal to bargain with the Employer, had the effect of restraining and coercing his employees in the exercise of their rights as above set forth. This theory, it seems to the undersigned, can be sustained only if it is found as a fact that the Union is not the freely chosen collective bargaining representative of the Employer's employees, acting on their behalf, and executing their wishes, but that in its negotiations with the Employer it was seeking to impose on him terms to which the employees, as well as the Employer, were opposed. The record contains nothing on which to base such a finding. It will be remembered that all of the employees of the Employer are members of the Union, and that, consequently, the Union has been found to be their duly designated agent for purposes of collective bargaining. Indeed, that finding was urged by the General Counsel in his complaint, and it was an indispensable element of his case with respect to the refusal of the Respondents to bargain. In the absence of evidence indicating that the Union, the freely chosen agent of the employees, has conducted itself contrary to the instructions of its principals vis a vis the Employer, the allegation of

the complaint that the Respondents restrained and coerced the employees must necessarily fall unless there is some rule of law creating a presumption that, in the circumstances of this case, the Respondent's conduct was contrary to the desires of the employees. The undersigned is aware of no such legal principle.

Counsel for the Employer has submitted a brief urging that conduct in violation of Section 8 (b) (3) of the Act is automatically in contravention of Section 8 (b) (1) (A). He points out that a refusal to bargain on the part of an employer, in violation of Section 8 (5) of the old Act (Section 8 (a) (5) of the Act as amended) has always been considered to constitute a violation of Section 8 (1) of the old Act, and Section 8 (a) (1) of the Act as amended. "Is it rational, then, and consistent," he asks, "to say that what is an unfair labor practice by the employer under 8 (a) (1) is not an unfair labor practice by the Union under 8 (b) (1) (A)"?

The undersigned is persuaded that the foregoing question must be answered in the affirmative. Reference to the language of the Act discloses that Section 8 (a) (2), (3), (4) and (5) are merely particularized definitions of some types of employer-conduct having the effect, generally described in Section 8 (a) (1), of interfering with, restraining, and coercing employees in the exercise of their rights as guaranteed in Section 7. The logical conclusion from these facts is that any conduct by an employer which is prohibited by Section 8 (a) (2), (3), (4) or (5), necessarily constitutes a violation

of the employer's obligation, as formulated in Section 8 (a) (1), to refrain from interfering with, restraining, or coercing his employees in the exercise of their statutory rights. However, this line of reasoning cannot be applied mechanically to acts committed by a labor organization (or its agent), which are violative of Section 8 (b) (3) of the Act, because the same interrelationship between such acts and those prescribed by Section 8 (b) (1) (A) does not exist as between employer-conduct violative of those subsections of 8 (a) other than 8 (a) (1) and the latter. When an employer commits any unfair labor practice, such conduct on his part constitutes a violation of Section 8 (a) (1) because that section is a formulation in general terms of the various specific forms of employer-conduct defined as interference with, restraint, or coercion of the employees' rights. But when employees, acting through their chosen bargaining agent, elect to engage in conduct which constitutes a refusal to bargain as defined in Section 8 (b) (3), it is not logical to conclude that they thereby restrained and coerced themselves in violation of Section 8 (b) (1) (A).

Counsel for the Employer contends in his brief that there is a presumption that the Respondents herein, by insisting on a closed-shop contract, were acting contrary to the wishes of the membership of the Union, because, as he asserts, the law will presume that "the members of a Union have authorized their agents, in this case the Respondents, to do that which is legal, namely, to bargain with the employer as required by the provisions of the Act."

No authority is cited in support of this proposition.[22] So far as appears from the record, none of the employees herein involved has ever revoked the authority of the Union to act as his collective bargaining representative, nor is there any showing that any member has ever repudiated the Union's authority to demand, on his behalf, a renewal of the closed-shop contract.[23] Unless we are to presume

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[22]For whatever help they may be to an analysis of this issue, the undersigned refers to the following recognized principles of the law of agency. An agent's apparent powers are considered to be his real powers, and the expression, "apparent authority" is defined as connoting that authority which a principal holds his agent out as possessing, under such circumstances as to estop the principal from denying its existence. (2 Corpus Juris Secundum, Agency, Sec. 96 (a) and (b)). The authority which the principal intended that the agent have may be implied from the principal's acquiescense in the exercise by the agent of his powers. (Abid., Sec. 99 (a)).

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[23]In answer to the argument of counsel for the employer that they were restrained from so doing by reason of the closed-shop conditions under which they were employed, it may be pointed out that the closed-shop contract in effect between the Union and the employer expired at the end of January, 1948, and has never been renewed; that the hearing herein ended on May 4, 1948; and that despite the announced firm intention of the employer to refuse to agree to a renewal of a closed-shop contract, no member of the Union has been shown to have repudiated the authority of the Union to represent him, or to take the position taken by that organization with respect to its demand for a closed-shop contract.

that the membership of the Union has no voice in the determination of its policies, which the undersigned has no warrant to believe, it must be concluded that the Union and its agent, Respondent Tidwell, were authorized by the membership to take the position they did in their negotiations with the Employer. As a matter of fact, the labor organization herein involved is not unique in contending that the employers with which it has bargaining relationships are not engaged in commerce, or that, for some other reason, the prohibitions of the Act against the closed shop do not apply to them, and in insisting, therefore, that its demands for closed-shop agreements are perfectly proper. A number of cases arising out of such contentions are presently awaiting final determination by the Board and the Courts. In these circumstances, it would not be surprising if the membership of the Union herein involved, as well as of the others mentioned, had authorized their bargaining agents to seek a test before the proper tribunals, of their aforesaid contentions.

The undersigned, for the foregoing reasons, will recommend that the complaint be dismissed insofar as it alleges that the Respondents' conduct in demanding a closed-shop contract was violative of Section 8 (b) (1) (A) of the Act.[24]

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[24]Counsel for the employer advances the argument in his brief that the Respondents' "boycott to force the employer to threaten his employees with discharge if they do not remain members of the Union is in itself a restraint upon the employees in the exercise of their rights under Section 7." This

(e) Alleged attempts by the Respondents to cause the Employer to discriminate against his employees, in violation of Section 8 (b) (2) of the Act.

Section 8 (b) (2) of the Act prohibits a labor organization or its agents from causing or attempting to cause "an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." (Underlineation supplied.)

The complaint alleges and the General Counsel contends that the Respondents' conduct in insisting that the Employer sign a closed-shop agreement constituted an attempt to cause the Employer to discriminate against his employees, in violation of Section 8 (b) (2).

In support of the aforesaid contention of the General Counsel, counsel for the Employer argues in his brief that "if it is an unfair labor practice

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reference to a boycott is undoubtedly to the listing of the employer on the "unfair list" of the Central Labor Council, which action was taken at the request of the Respondents. For the same reasons as above stated, the undersigned sees no merit in this contention. We are called upon to presume, without supporting evidence, that the action initiated by the employees themselves, through their Union, had the effect of restraining themselves in the exercise of their rights under the Act.

under 8 (a) (3) for an employer to sign a closed-shop agreement, and an unfair labor practice under 8 (b) (2) for a union to attempt to cause an employer to violate 8 (a) (3), it is an unfair practice under 8 (b) (2) for the Union to attempt to cause an employer to sign a closed-shop contract." This argument is based on the stated assumption that "it is an unfair labor practice under 8 (a) (3) for an employer to sign a closed-shop agreement." To the extent that this statement implies that the argument fails if the assumption upon which it is founded is shown to be incorrect, the undersigned finds himself in agreement with it. The pertinent provisions of Section 8 (a) (3) make it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. The commonly accepted definition of the word, "discriminate," in the sense in which it is used in this section, is, "to make a difference in treatment or favor of one as compared with others."[25] To hold that the mere signing of a contract by an employer, in which he agrees to discriminate against nonmembers of a union, constitutes the act of discrimination, would be unduly to distort the plain meaning of the word. The undersigned is convinced that discrimination does not take place within the meaning of Section 8 (a) (3) until the employer

[25]Webster's Collegiate Dictionary, Fifth Edition (G. & C. Merriam Co.).

actually treats an employee, or applicant for employment, differently from others in respect to hire or tenure or some term or condition of employment, based on his membership or non-membership in a labor organization. Since what the Respondents were attempting to cause the Employer to do, namely to sign a closed-shop contract, would not in itself constitute discrimination as prohibited by Section 8 (a) (3), their said conduct should not be found to have been in violation of Section 8 (a) (2). This is not to say, as counsel for the Employer argues, that the prohibition of the Act against closed-shop contracts can be enforced "only after the performance of such illegal contract . . . [which] will tend only to encourage and facilitate violations of the Act, add to the difficulties of enforcement, and frustrate the intent and purposes of Congress." While a threat or promise to discriminate, on the part of an employer, does not constitute discrimination, it is undoubtedly true that such a threat does have the effect of restraining or coercing his employees, and prospective employees, in the exercise of their right to join or refrain from joining a labor organization. Consequently the signing by an employer of a closed-shop contract would constitute a violation of Section 8 (a) (1) of the Act. Thus, in a proper case, the remedial powers of the Board would be available to enjoin the execution or performance of such a contract even before any acts of discrimination had taken place.[26] But in the

[26]See, for example, the following Board decisions, in which the Board has adhered to a consistent

present proceeding we are not faced with this problem, since the Employer has refused to sign the closed-shop contract tendered by the Union. Moreover, it having been found that the Respondents' insistence on this illegal contract constituted a violation of Section 8 (b) (3), an order designed to remedy the effects of that unfair labor practice, and enjoining such conduct on their part in the future, will be recommended. Since to find a violation of Section 8 (b) (2) on the part of the Respondents, based on the same conduct, would necessitate a strained interpretation of the language of the statute, and since the policies of the Act will in any event be fully effectuated by the order directed against the 8 (b) (3) violation, the undersigned will recommend that the complaint be dismissed insofar as it alleges that the Respondents' insistence upon a closed-shop contract constituted a violation of Section 8 (b) (2).[27]

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policy of refusing to find that an employer's conduct in entering into a discriminatory contract constituted a violation of Section 8 (3) of the old Act, but in which it has pointed out that its remedial order directed against the 8 (1) violation adequately effectuated the policies of the Act: Matter of Palmer Fruit Co., 51 N.L.R.B. 924, 925; Matter of Worthington Creamery and Produce Co., 52 N.L.R.B. 121, 122; Matter of Flotill Products, Inc., 70 N.L.R.B. 119, 122; Matter of G. W. Hume Co., 71 N.L.R.B. 533, 534.

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[27]Although the complaint contains no such allegation, counsel for the Employer contends that "there is evidence in the record that Respondent Haskell Tidwell has, by his own admission" discriminated

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in Section III, above, occurring in connection with the business operations of the Employer, described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent Union, and the Respondent Tidwell, as its agent, have refused to bargain within the meaning of Section 8 (b) (3) of the Act, and in order to effectuate the policies of the Act, the undersigned will recommend that they cease and desist therefrom and, upon request of the Employer, or his duly designated representative, bargain with him.

The undersigned will also recommend that the

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against employees by denying them membership in the Union on grounds other than their failure to tender the dues and initiation fees uniformly required as a condition of acquiring membership, thus causing them to be refused employment. He argues that this conduct by Tidwell constituted a violation of Section 8 (b) (2). As has been above found with respect to a similar contention advanced by counsel for the Employer, the undersigned does not deem this issue to have been properly raised, nor does he regard the evidence in the record as adequate to support a finding.

Respondents post appropriate notices to the membership of the Respondent Union, which it is found, will effectuate the policies of the Act.

Upon the basis of the above findings of fact and the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. H. W. Smith, doing business as A-1 Photo Service, at San Pedro, California, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Local 905 of the Retail Clerks International Association (AFL) is a labor organization within the meaning of Section 2 (5) of the Act.

3. Haskell Tidwell, secretary of the Respondent Union, is, and at all times material herein was and acted as, an agent of the said Union for the purpose of collective bargaining with the Employer.

4. All clerical employees, excluding supervisory employees and the public accountant employed on a part-time basis, by the Employer at his place of business in San Pedro, California, constitute, and at all times material herein constituted, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

5. Local 905 of the Retail Clerks International Association (AFL) was at all times material herein, and now is, the exclusive bargaining representative of the employees in the aforesaid unit for purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

6. By refusing to bargain collectively with the Employer, the Respondent Union and the Respondent Tidwell as its agent, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (3) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

8. By their aforesaid conduct the Respondents have not engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) or Section 8 (b) (2) of the Act.[28]

Recommendations

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that Local 905 of the Retail Clerks International Association (AFL), Haskell Tidwell as its agent, and its other officers and agents shall:

1. Cease and desist from refusing to bargain collectively with H. W. Smith, doing business as A-1 Photo Service, of San Pedro, California, or with his duly designated collective bargaining representative, as the exclusive representative of the said Employer's clerical employees, excluding supervisory

[28]In his brief, counsel for the Employer submitted proposed conclusions of law. Consistent with the conclusions of law hereinabove made, the undersigned rules as follows upon the proposed conclusions filed by counsel for the Employer: Those numbered I through V, and that numbered VIII, are accepted. Those numbered VI and VII are rejected.

employees and the public accountant employed by him on a part-time basis, at his said place of business in San Pedro, California, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) On request, bargain collectively with the aforesaid Employer or his duly designated collective bargaining representative, as the exclusive representative of the employees composing the unit above found to be appropriate for the purpose of collective bargaining, with respect to rates of pay, hours of employment, or other conditions of employment, and if an agreement is reached, embody such agreement in a signed contract;

(b) Post in a conspicuous place or places at the business offices and/or meeting hall of the Respondent Union, or whatever place or places notices or communications to members are customarily posted, a copy of the notice attached hereto as Appendix A, and furnish copies thereof to each member of the Respondent Union who is employed by the Employer, either by mailing or by hand; copies of the said notice to be supplied by the Regional Director of the Board for the Twenty-first Region. The aforesaid notices shall be posted and distributed to members immediately upon their receipt, and shall remain posted as above recommended for a period of 60 days thereafter. Reasonable steps shall be

taken by the Respondents that the posted notice be not altered, defaced, or covered by other material;

(c) Notify the Regional Director of the Twenty-first Region in writing within twenty (20) days from the receipt of this Intermediate Report what steps the Respondent Union, and the Respondent Tidwell, as its agent, have taken to comply herewith.

It is further recommended that, unless the said Respondents shall within twenty (20) days from the receipt of this Intermediate Report notify the said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring them to take the action aforesaid.

It is recommended that the complaint be dismissed insofar as it alleges that the Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) or Section 8 (b) (2) of the Act.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board —Series 5, effective August 22, 1947, any party may within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and

six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

If no statement of exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations and recommended order herein shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

Dated: July 19, 1948.

/s/ ISADORE GREENBERG,

Trial Examiner.

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS

Respondents above named, through their counsel, except to those portions of the Intermediate Report and Recommended Order, and to those portions of the Record, as follows:

1. Respondents except to that portion of the Findings of Fact, I, (I.R. p. 4) reading as follows: "Of the merchandise delivered to the Employer by local wholesale dealers from within California, a substantial proportion originates, i.e., is shipped to the local suppliers, from outside the State of California," together with footnote "7" thereof; on the ground that it is immaterial, irrelevant, incompetent, not probative of "commerce" under the Labor Management Relations Act, 1947, and does not tend to prove the burdening or obstruction of commerce directly and substantially.

2. Respondents except to that portion of the Findings of Fact, I (commencing I.R. last paragraph page 4 to Findings of Fact II) and particularly to that portion thereof reading as follows: "It is found that the Employer, H. W. Smith, doing business as A-1 Photo Service Company, is engaged in commerce within the meaning of the Act." (Findings of Fact, I, I.R. p. 5); on the ground that these are not supported by the evidence and are contrary to law.

3. Respondents except to all of the Findings of Fact, III, entitled "The Unfair Labor Practices,"

(I.R. pp. 5-10 inclusive); on the ground that they are contrary to, and not supported by the evidence, and are contrary to law.

4. Respondents except to the Findings of Fact, III, C Subsection 1 (c) entitled "The Respondent's Refusal to Bargain, in violation of Section 8 (b) (3) of the Act." (I.R. pp. 10-12 inclusive.)

5. Respondents except to Findings of Fact, IV, entitled "The Effect of the Unfair Labor Practices Upon Commerce," (I.R. p. 16); on a ground that they are contrary to the evidence and to law.

6. Respondents except to Conclusions of Law: 1, 6 and 7; (respectfully at I.R. pp. 16 and 17); on a ground that they are contrary and not supported by the evidence and contrary to and in violation of law.

7. Respondents except to the rulings of the Trial Examiner denying their motion to dismiss the Complaint. (Record—Report of Proceedings, pp. 36-55 inclusive.)

Therefore, Respondents urge that their exceptions herein set forth be sustained, and that in these respects, the Trial Examiner be reversed, and that the National Labor Relations Board do not adopt his recommendations.

September 9, 1948.

Respectfully submitted,

/s/ ALEXANDER H. SCHULLMAN,
Attorney for Respondents.

Affidavit of Service by Mail attached.

Acknowledged September 15, 1948.

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS

General Counsel hereby excepts to the Intermediate Report and Recommendation of the Trial Examiner in the above entitled matter as follows:

A. Generally

In that the Trial Examiner did not in accordance with Section 203.16 of the Rules and Regulations find that all allegations in the Complaint were admitted to be true and may be so found by the Board upon the failure of the Respondents to file an answer to the Complaint, as stated on page 2, line 26, of the Intermediate Report.

B. Specifically

General Counsel hereby excepts to the following portions of the Intermediate Report and Recommended Order:

Reference to Intermediate Report		
Page	Lines*	
11	36-42	To the finding that there is nothing in the record which casts doubt on the good faith of the Respondents because of their contention that the Act did not apply.

*Page and line numbers refer to original.

Page	Lines	
14	5-15	To the finding that it must be concluded that Respondents were authorized by the membership to act as they did.
Page	Lines	
14	21-25	To the finding and recommendation that the Complaint be dismissed insofar as it alleges that the Respondents' conduct in demanding a closed shop contract was violative of Section 8 (b) 1 A of the National Labor Relations Act.
		To the failure to find that Respondents' conduct was violative of Section 8 (b) 1 A of the National Labor Relations Act.
Page	Lines	
15	26-37	To the finding that Respondents' activity does not constitute a violation of Section 8 (b) 2 of the National Labor Relations Act.
Page	Lines	
16	6-14	To the finding that Respondents have not violated Section 8 (b) 2 of the National Labor Relations Act.
		To the recommendation that the Complaint be dismissed insofar as as it alleges that the Respondents' insistence upon a closed shop con-

tract constitutes a violation of Section 8 (b) 2 of the National Labor Relations Act.

To the failure to find Respondents' conduct violative of Section 8 (b) 2 of the National Labor Relations Act.

Page	Lines	
16	26-31	To the failure to find that Respondents' acts constituted violation of Section 8 (b) 1 A and 8 (b) 2, and failure to recommend that Respondents cease and desist from such activity.
17	25-27	(No. 8 of Conclusions of Law.) To the finding that Respondents have not engaged in unfair labor practices within the meaning of Section 8 (b) 1 A or Section 8 (b) 2 of the National Labor Relations Act.

To the failure to find that Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) 1 A or Section 8 (b) 2 of the National Labor Relations Act.

Page	Lines	
17	35-43	(Recommendations, No. 1.) To the failure to recommend that Respondents cease and desist from en-

gaging in acts violative of Section 8 (b) 1 A and Section 8 (b) 2, more specifically, to cease and desist from restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, and from causing or attempting to cause an employer to discriminate against an employee in violation of subsection 8 (a) (3).

Appendix A

To the failure to include in Notice statement that Respondents will cease and desist from the acts described in Exception to that portion of the Intermediate Report and Recommended Order on Page 17, Lines 35-43.

ROBERT N. DENHAM,
General Counsel.

CHARLES K. HACKLER,
Chief Legal Officer,
Twenty-First Region.

/s/ EUGENE M. PURVER,
Attorney, National Labor
Relations Board.

September 24, 1948.

Received September 28, 1948.

United States of America
Before the National Labor Relations Board
In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, SECRETARY-TREASURER, AND ALBERT E. MORGAN, BUSINESS AGENT

and

H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

Case No. 21-CB-34

DECISION AND ORDER

On July 19, 1948, Trial Examiner Isadore Greenberg issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents[1] had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in certain other alleged unfair labor practices, and recommended dismissal of

[1]At the hearing, the Trial Examiner dismissed the complaint with respect to Respondent Albert E. Morgan. Accordingly, the term "Respondents," as used herein, refers only to the Union and Haskell Tidwell.

these allegations of the complaint. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report and briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and finds merit in the Respondents' exceptions in the respects indicated below.

The record shows, as set forth in detail in the Intermediate Report, that the Employer, an individual, is sole proprietor of a retail store at San Pedro, California,[2] where he sells photographic equipment and supplies, greeting cards, and stationery. His only regular employees are three clerks. During the year ending March 31, 1948, the Employer purchased for his business merchandise valued at $100,146.69, approximately 44 per cent of which was purchased from wholesalers located outside the State of California and was delivered to him from points outside the State. The rest was purchased locally and, except for a small amount, was shipped to the Employer from within the State; a substantial amount, however, originated outside the State. The Employer's sales during the same period amounted to approximately $133,000. Except for merchandise valued at approximately

[2]The Employer also owns part of a store at Torrance, California; but only the San Pedro store is involved in this proceeding.

$2,600 sold and delivered to customers outside the State or to installations of the United States Army and Navy, all sales were made to retail customers within the State.

Upon these facts, which are not contested, the Trial Examiner concluded that the Employer was engaged in commerce within the meaning of the Act, and that the Respondents' activities had a close, intimate, and substantial relation to commerce and tended to lead to labor disputes burdening and obstructing commerce. It is clear to us, however, that the Employer's business is essentially local in nature and relatively small in size, and that the interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. Recently, we have dismissed several proceedings involving such enterprises, on the ground that the assertion of jurisdiction would not effectuate the purposes of the Act.[3] The Respondents urge that we dismiss this proceeding for the same reason. The General Counsel, on the other hand, contends that once he has issued a complaint in an unfair labor practice case, the Board Members have no authority to decline to assert jurisdiction on policy grounds, if jurisdiction in fact exists. For the reasons given below, we find no merit in this contention.

Under Section 10 of the Act, as amended the

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[3]See, for example, Matter of Hom-Ond Food Stores, Inc., 77 N.L.R.B. 647; Matter of Sun Photo Company, 78 N.L.R.B. 1249; Matter of Walter J. Mentzer, 82 N.L.R.B., No. 39.

Board is "empowered" to prevent any person from engaging in any unfair labor practice "affecting commerce," but it is not directed to exercise its preventive powers in all such cases. From this, we believe it reasonable to infer, in the absence of any convincing evidence to the contrary,[4] that Congress intended the Board to continue to have discretionary authority to decline to exercise these powers in appropriate cases, as it had under the Wagner Act. The Board can now exercise this discretionary authority only by dismissing a complaint. We have therefore dismissed complaints—as we have declined to proceed with representation cases—when, in our opinion, the assertion of jurisdiction would not effectuate the policies of the Act.[5]

The General Counsel argues that the Board has no authority to take such action, claiming that: (1) the concept of discretion in the Board to assert or reject jurisdiction on policy grounds is incompatible with the General Counsel's "final authority," under Section 3 (d), over the issuance and prosecution of complaints; (2) it was judicially decided in the Jacobsen case[6] that the Board has an

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[4]Cf. Matter of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., 80 N.L.R.B., No. 91; Matter of Samuel Langer, 82 N.L.R.B., No. 132.

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[5]Matter of Walter J. Mentzer, supra.

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[6]Jacobsen v. N.L.R.B., 120 F. 2d 96 (C.A. 3), setting aside and remanding Matter of Protective Motor Service Company, 21 N.L.R.B. 552.

affirmative duty, once a complaint has been issued and a hearing held, to determine whether jurisdiction exists, and if it does exist, to determine the case on the merits; and (3) the separation of judicial and prosecuting functions under the amended Act precludes the Board from refusing to assert jurisdiction in complaint cases when jurisdiction in fact exists under the commerce clause.

It is true that the Board cannot itself issue a complaint; it cannot compel the General Counsel either to issue or refrain from issuing one; it cannot review his action in refusing to issue one.[7] Furthermore, the legislative history shows that Congress intended the General Counsel to exercise his authority to issue or refrain from issuing a complaint independently of any direction, control, or review by the Board. But after a complaint has issued and a hearing has been held, the "final authority" of the General Counsel is exhausted, and the case is then in the hands of the Board. Any action the Board may take thereafter, either as a matter of policy or on the merits, does not constitute a review of the General Counsel's "issuance" or "prosecution" of the complaint, but is the exercise of the Board's judicial powers under the Act. No judicial or quasi-judicial power has been vested in the General Counsel by statute. To argue that

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[7]Section 3 (d) provides, insofar as here relevant, that the General Counsel of the Board . . . shall have final authority . . . in respect of the . . . issuance of complaints under Section 10 and in respect of the prosecution of such complaints before the Board . . .

it has been, is to argue against the very theory of separation of functions which gave rise to congressional establishment of that independent office. He is to investigate and prosecute, but the Board is to judge.

Nor do we agree with the General Counsel's further contention that the decision in the Jacobsen case has relevance to the issue before us. In that case, the Board, although denying the charging parties' petitions to present additional evidence on interstate commerce, nevertheless dismissed the complaint on the ground that the facts set forth in the record were not sufficiently developed to afford a basis for determining whether the operations of the employer did affect commerce. The Court of Appeals for the Third Circuit remanded the case to the Board, saying:

* * * The Board, having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the Protective Motor Service Company affected commerce within the meaning of the Act. * * *

This language may seem, at first glance, to lend some support to the General Counsel's position. But in the Jacobsen case the Board had not found that the assertion of jurisdiction would not effectuate the policies of the Act; consequently, the court did not have before it the question of the Board's authority to dismiss on that ground. Furthermore, the Jacobsen case arose under the Wagner Act, when, as the court noted, the Board in its discre-

tion could have refused to issue a complaint.[8] Even assuming, therefore, that that decision could properly be interpreted as holding that the Board had no authority to dismiss such a complaint for policy reasons, the same court might find it necessary to reach a different conclusion under the amended Act, which precludes the Board from exercising discretion at that early stage of the proceeding. Furthermore, the Supreme Court has indicated that in some circumstances, at least, the Board does have authority to dismiss a complaint on policy grounds. Thus, in the Indiana & Michigan Electric Company case,[9] also decided under the Wagner Act, it said:

The Board might properly withhold or dismiss its own complaint if it should appear that the charge is so related to a course of violence and destruction carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process. (Emphasis supplied.)

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[8]The court said: It will be noted that the jurisdiction of the Board is not a compulsory jurisdiction. Assuming that all circumstances looked to by the Board are in existence, none the less we are of the opinion that the Board does not have to cause a complaint to be issued or proceed to prohibit any unfair labor practices complained of. The course to be pursued rests in the sound discretion of the Board and is the concern of expert administrative policy.

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[9]N.L.R.B. v. Indiana & Michigan Electric Company, 318 U. S. 9.

Finally, we find nothing in the amended Act, or in its legislative history, to support the General Counsel's contention that the separation of the judicial and prosecuting functions of the agency precludes the Board Members from exercising discretion to decline to assert jurisdiction if commerce is in fact affected. The separation of functions was accomplished by creating the statutory office of General Counsel, with the specific duties and authority set forth in Section 3 (d). In other respects, the powers possessed by the Board under the Wagner Act, insofar as here relevant, remain unchanged. In our opinion, Section 3 (d) cannot be interpreted to oust the Board of power to determine its own policies for effectuating the purposes of the Act.

Nothing in the Act or the legislative history indicates that the Congress concluded that only the General Counsel had the wisdom to determine what would and what would not effectuate the stautory policy. It is clear that the General Counsel alone was to exercise discretion as to the issuance of complaints, but it is equally clear that the General Counsel's judgment was not to control the Board at the decisional stage of any proceeding. Separation of functions was evidently intended to bar judges from being "prosecutors"; surely Congress was not seeking, by the same provision, to convert prosecutors into judges.

For the above reasons, we find, contrary to the

General Counsel's contention, that the Board has discretionary authority to dismiss complaints for policy reasons, even though commerce is affected.[10] Moreover, we believe that, in the absence of special circumstances, it is a proper exercise of such discretion to dismiss cases in which, as here, the business involved is so small and so local in nature that the interruption of operations by a labor dispute could have only a remote and insubstantial effect on commerce. We shall therefore dismiss this complaint in its entirety.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondents, Local 905 of the Retail Clerks International Association (AFL) and Haskell Tid-

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[10]The Board has likewise dismissed unfair labor practice allegations for policy reasons in other circumstances: for example, on the ground that the charging party had not attempted to utilize the machinery established by a collective bargaining contract (Matter of Consolidated Aircraft Corp., 47 N.L.R.B. 69); or that the respondent had abided by a proper settlement agreement (Matter of Godchaux Sugars, Inc., 12 N.L.R.B. 568; Matter of Wickwire Brothers, 16 N.L.R.B. 316; Matter of Midwest Piping and Supply Co., Inc., 63 N.L.R.B. 1060, 1074). Similarly, the Board has sometimes followed the administrative practice of issuing no findings or order where a respondent complied with the recommendations of an Intermediate Report to which no exceptions were filed.

well, Secretary-Treasurer, be, and it hereby is, dismissed.

Signed at Washington, D. C., this 13th day of May, 1949.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JAMES J. REYNOLDS, JR.,
Member.

ABE MURDOCK,
Member.

J. COPELAND GRAY,
Member.

[Seal] NATIONAL LABOR RELATIONS BOARD.

[Title of Board and Cause.]

MOTION OF GENERAL COUNSEL FOR RECONSIDERATION BY THE BOARD OF ITS DECISION AND ORDER.

Now comes the General Counsel and moves the Board to reconsider its Decision and Order in the above-entitled proceeding.

On May 13, 1949, the Board issued its order dismissing the complaint in the above-captioned proceeding. The rationale of the Board's decision in

support of its order raises questions of major importance in the administration of the Act and plainly requires the Board to re-examine the position expressed in its opinion. The General Counsel submits the Board erred in holding that:

I. Despite the proper issuance of the complaint by the General Counsel pursuant to administrative discretion vested by statute in him exclusively, the Board, in the exercise of its judicial functions, and as a judicial function, has statutory authority to overrule the administrative decision of the General Counsel that a complaint should issue, and, in its judicial capacity, to refuse to exercise its jurisdiction over the case, where such jurisdiction exists in fact.

II. The authority of the Board to decline to exercise such jurisdiction rests in a statutory grant to the Board of discretionary authority to take such measures as will, in its opinion, effectuate the policies of the Act.

In support of this motion, the General Counsel shows as follows:

I.

The Board does not, by virtue of its judicial functions, possess a discretion denied both to the Courts and to other administrative agencies charged with judicial or quasi-judicial duties.

In matters pertaining to questions concerning representation, the Board acts solely and only as an administrative body. All its decisions, findings, and directions in the representation field are ad-

ministrative acts, exercised by virtue of and pursuant to the administrative functions of the Board. As such, they are not subject to appeal or to review by any court, except as specifically provided in the Act when they are integrated with the issues in an unfair labor practice charge brought under Section 8 (a) (5).

The administrative powers and authorities of the Board, granted by the Act, and not conferred on the General Counsel either by the language of the statute or under the Delegation of Authority dated August 21, 1947, are limited to the field of matters concerning questions of representation. In that field, no contention is made that any limit is placed on the Board's exercise of administrative discretion to "effectuate the policies of the Act," so long as such discretion is not abused or capriciously exercised.

In the field of unfair labor practices, however, the statute has made it clear that administrative discretion has been withdrawn from the Board with reference to the disposition of unfair labor practice charges or complaints. Administrative disposition of unfair labor practice charges has become one of the functions of the General Counsel. It is his administrative discretion alone that determines whether, and when, and on what principle a complaint will issue—and inherent in that, is the exclusive duty to determine whether the prosecution of the charge would effectuate the policies of the Act. In short, the General Counsel determines—

first: whether jurisdiction, in his opinion, does in fact lie; and second: whether the policies of the Act will be effectuated by prosecuting the charge.

In its decision here, the Board concedes that it cannot reach out and cause a complaint to issue where the General Counsel has determined that it should not issue—whether such determination be based on policy or on the factual merits; but, says the Board, as a part of our judicial functioning, we can administratively determine that the affirmative administrative determination of the General Counsel is within our reach, and that regardless of the factual merits, and conceding the case is within the jurisdictional area of the Agency, we can review and reverse such administrative decision of the General Counsel, in the exercise of our judicial functions, and refuse to consider the issues, no matter how meritorious they may be between the parties and under the law.

The reasoning set out in the Board's opinion in this case writes into the provisions of the Act, features that not only are not there, but provisions that the legislative history clearly points out, were intentionally omitted. Whether, under the Wagner Act, the Board had a broader discretion, is hardly material now, for the facts and the basic structure of the law have completely changed. Under the Wagner Act, the Board was the only place where administrative discretion as to whether prosecution would effectuate the policies of the Act, could be exercised. Here, that is not true.

From the legislative history of the Taft-Hartley Act, comes the conclusion that Congress was not entirely satisfied with the arrangement that combined that administrative and prosecuting function with the duty to determine judicially (1) whether jurisdiction, in fact, exists; (2) whether the facts indicate that an unfair labor practice has, in fact, been committed, and (3) what, if anything, should be required to be done by the parties, as a means of effectuating the policies of the Act, by way of remedying the situation. Sections 3 (d) and 4 (a) of the present law provide the answer to that, by taking it away from the Board, giving it exclusively to the General Counsel, and, insofar as unfair labor practices are concerned, making the Board into a court with all its duties in that field confined to the judicial functions.

In its decision in this case, the Board has failed to note that there is a broad line of demarcation between administrative disposition of cases, which may turn on pure policy regardless of factual merit and are not reviewable, and decisions arising from the exercise of the judicial functions, in which the reason for the determination must rest on a sound legal or factual base.

Notwithstanding the Board's statement to the contrary, the decision reached in this case is not arrived at in the exercise of a judicial function, for it admittedly disregards the legal or factual issues in a case that rests within the Agency's statutory jurisdiction. It is bottomed entirely on an

erroneous assertion of power to decline jurisdiction where jurisdiction exists in fact, on the theory that any action taken by the Board subsequent to the issuance of the complaint "either as a matter of policy or on the merits * * * is the exercise of the Board's judicial powers under the Act."

It is true, as the Board indicates, that the respective roles of the Board and the General Counsel are analogous to those of judge and prosecutor in other branches of the law. Nor is it denied that once the General Counsel has issued his complaint, the Board, like a court, has both the authority and the duty to interpret and apply the statute, and may, in the fulfilment of that duty arrive at conclusions contrary to those of the General Counsel. But assuming, arguendo, the accuracy of the Board's analogy, the exercise of judicial or quasi-judicial functions does not carry with it any inherent power to decline to exercise an existent jurisdiction.

To the contrary, the very fact that the Board admittedly is functioning in its judicial capacity, prevents it from declining to decide the merits of a case properly before it. A prosecutor may well decide that to issue a complaint in a particular case would not effectuate the public policy, as the Board in its decision admits, but once he has brought the case to court, the court cannot decline to decide it. The duty resting on those exercising judicial power to exercise their jurisdiction has been uniformly recognized since it was given classic expression by

Chief Justice Marshall, speaking for the Court, in Cohens v. Virginia, 6 Wheat. 264, 404:

It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. (Emphasis added.)[1] Particularly relevant here since the Board declined to act in the instant case because "The business in-

[1]See also Meredith v. Winter Haven, 320 U.S. 228, 234: "jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience," and note the observation of the Court of Appeals for the Fourth Circuit that "The right of a party litigant to the judgment of a court upon a matter properly before it is a fundamental aim of the law." United States v. 1 Dozen Bottles, 146 F. 2d 361, 363.

volved is so small and so local in nature," is the decision in Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * * That the case may be one of local interest only is entirely immaterial." (Emphasis added.)

The necessary implication in the Board's decision is that because it has some judicial authority, it also has inherent power to substitute its conception of public policy for the specific duties imposed upon it by statute. This claim is similar to that occasionally advanced by judges of inferior federal courts but rejected by reviewing tribunals. Thus in United States v. Wingert, 55 F. 2d 960 (E. D. Pa.), a district court, following an indictment, declined to issue a bench warrant for the arrest of the person indicted, claiming that such refusal lay within its judicial discretion. The Supreme Court thereupon issued a writ of mandamus commanding the district court to issue the warrant, and noting that the authority to issue the warrant does not "carry with it the power not to do so under the guise of judicial discretion; * * * the power to enforce does not inherently beget a discretion permanently to refuse to enforce," Ex parte United States, 287 U.S. 241, 250. (Emphasis added.)

The Board's determination that to assert existing statutory jurisdiction would not effectuate the policies of the Act is similar to the "considerations of humanity and public well-being" which had led inferior federal courts, prior to the Probation Act, to suspend sentences imposed in certain criminal

cases. Ex parte United States, 242 U.S. 27, 51. But in that case the Supreme Court, at p. 42, expressly disapproved the proposition that "the power to enforce begets inherently a discretion to permanently refuse to do so" and held that the action of the court below "amounts to a refusal by the judicial power to perform a duty resting upon it" Idem at p. 52. In language fully applicable to the Board, the Court pointed out that "to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things completely adequate." Idem.[2]

Thus, it is not open to question that a judicial body is not free to decline jurisdiction vested in it or to escape duties imposed upon it by law. And administrative agencies, insofar as they exercise judicial functions, stand on no better footing. I.C.C. v. Humboldt S. S. Co., 224 U.S. 474, 489; Louisville Cement Co. v. I.C.C., 246 U.S. 638; U.S. ex rel CG.W.R. Co. v. I.C.C., 294 U.S. 50, 60, 61; Jacobsen v. N. L. R. B., 120 F. 2d 96 (C. A. 3).[3] That

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[2]Congress responded by passing the Probation Act, conferring the necessary discretionary authority theretofore lacking.

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[3]The Board concedes that there is language in the Jacobsen case supporting the contention that the Board is under a duty, once a hearing has been held, to determine the existence of jurisdiction and

administrative discretion does not extend to the refusal of jurisdiction "plainly and palpably" created by Congress is the clear import of the C.G.W.R. Co. case (at p. 61) and the other cases cited immediately above.

II.

The Board may not exercise a discretion to decline to exercise an existent jurisdiction unless such discretionary power is expressly granted

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if it exists to decide the case on the merits. It denies that the Jacobsen case is relevant to the issue herein asserting that

The Jacobsen case arose under the Wagner Act, when, as the court noted, the Board in its discretion could have refused to issue a complaint. [footnote omitted] Even assuming, therefore, that that decision could properly be interpreted as holding that the Board had no authority to dismiss such a complaint for policy reasons, the same court might find it necessary to reach a different conclusion under the amended Act, which precludes the Board from exercising discretion at that early stage of the proceeding.

In other words, the Board admits that Congress intended to strip it of discretionary authority over the issuance of complaints and then argues that as a result of such stripping the Board necessarily acquired similar authority at a later stage at which it had not previously (under the Wagner Act) possessed it. But the Board points to nothing in the amended Act which compels such a conclusion. Moreover, the Board's admission that all it is exercising here is the authority it once held to refuse to issue a complaint stands in contrast to its denial that it is usurping a function of the General Counsel, and to its insistence that it is exercising a purely judicial function.

by the statute or may be reasonably inferred therefrom.

It has been shown that the Board does not, merely by virtue of its quasi-judicial functions, possesses an inherent power to refuse to exercise an existent jurisdiction. Such a power must be found, if at all, solely in the provisions of the statute administered by the Board, the statute to which the Board owes its creation and continued existence.[4] In creating the Board, Congress established an agency which, like the Federal Trade Commission "is charged with the enforcement of no policy except the policy of the law" and was "created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." Humphrey's Executor v. United States, 295 U.S. 602, 624, 628. As Judge Jerome Frank, then Chairman of the S.E.C., speaking for the Commission, stated:

The suggestion * * * that Section 20 [of the Public Utility Holding Company Act of 1935] authorizing us to make orders to effectuate the policies of the Act, would justify a denial by order of an exemption granted by a pre-existing and valid rule must be rejected * * * The order-making authority under Section 20 may be used only to implement

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[4]As indicated hereinafter, the Board does assert that the power claimed is to be found in a specific provision of the amended Act. It does not assert any other statutory basis for its claim, nor does it point to any judicial authority confirming such power independently of statute.

an existing standard imposed by statute or valid rule. Just as the order-making power under that section could not properly be used to abrogate standards not imposed by the statute itself so it may not be used to abrogate standards imposed by valid rules which have the force and effect of law. Matter of Consumers Power Co., Pike and Fischer, Admin. Law, 33 F. 11-4n. (6 S.E.C. 444).[5]

III.

No provision of either the National Labor Relations Act, as amended or any other statute, confers on the Board a discretion to refuse to exercise an existent jurisdiction.

In its decision, the Board does attempt to find a statutory basis for its refusal to exercise jurisdiction where such jurisdiction exists in fact. It points to Section 10 of the amended Act as conferring the alleged authority, and then proceeds to ignore all the provisions of that Section except the first sentence of subsection (a) thereof. That first sentence reads as follows:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce (emphasis added).

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[5]Judge Frank went on to say: "If the Commission intended to proceed by an ad hoc inquiry in each case, the promulgation of the exemptive rule was not merely unnecessary; it was misleading. It is impossible to believe that Congress, or the Commission when it promulgated the rule, intended the suggested anomalous procedure to be followed. Idem.

In construing the quoted provision the Board argues that it is merely "empowered" to prevent unfair labor practices affecting commerce, "but it is not directed to exercise its preventive powers in all such cases." From this it infers "that Congress intended the Board to continue to have discretionary authority to decline to exercise these powers in appropriate cases,"[6] notwithstanding the language of Section 3 (d) describing the exclusive authority of the General Counsel. Thus, the Board having pointed to Section 10 as the source of its claimed discretionary authority, ignores all but the first sentence of the section, and does so despite the specific prescription therein that the prevention of unfair labor practices is to be accomplished in accordance with all the provisions of Section 10. For Section 10, which is specifically entitled "Pre-

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[6]The Board does not assert that its alleged discretionary power to decline to exercise an existent jurisdiction is authorized by the provision in Section 10 (c) which states that the Board is "to take such affirmative action . . ., as will effectuate the policies of this Act." As the General Counsel has clearly shown in his Substituted Supplemental Brief (pp. 5-6) submitted to the Board prior to its issuance of the instant decision and order, the quoted language does not confer a general discretion on the Board to require any action which "will effectuate the policies of the Act" such as would support a claim to authority to refuse to assert jurisdiction on policy grounds. It merely provides an added tool to supplement the mandatory cease and desist order and the power it confers is limited to cases in which the Board has already determined that unfair labor practices have occurred.

vention of Unfair Labor Practices," establishes a complete and integrated statutory scheme for the prevention of such practices. No part or provision of that section may properly be read in isolation from the remainder thereof as the language of the first sentence of subsection (a) itself, quoted above, and the long-familiar rules of statutory construction make abundantly plain. Helmich v. Hellman, 276 U.S. 233, 237; Wilson v. Rousseau, et al. 145 U.S. 646, 677; Puerto Rico v. Shell Co., 302 U.S. 253, 258; United States v. American Trucking Ass'ns, 310 U.S. 534, 542-544; United States v. Cooper Corporation, 312, U.S. 600, 607; Pennington v. Coxe, 6 U.S. 33, 52; Iglehart v. Iglehart, 204 U.S. 478, 484-485; Gayler et al. v. Wilder, 51 U.S. 476, 495; Market Co. v. Hoffman, 101 U.S. 112, 115-116; Browne v. Duchesne, 60 U.S. 183, 194.

The General Counsel respectfully submits that the Board, in construing the first sentence of Section 10 (a) as the source of its claimed discretionary authority, has utterly misapprehended its true meaning. That sentence, read in the context of Section 10 as a whole, does not authorize the Board in its discretion to decline to exercise its power to prevent unfair labor practices affecting commerce. It is limiting and restrictive language. It simply constitutes the grant of the Board's jurisdiction and the limits thereof in exactly the same manner as does any legislative grant of limited jurisdiction to an administrative agency or inferior judicial tribunal. It is not, as the Board asserts, permissive rather than mandatory in character. The choice of the allegedly permissive word "empowered"

rather than a mandatory term such as "shall" was clearly dictated by the need for incorporating the provisions of subsection (b) into Section 10 without thereby contradicting the provisions of subsection (a).

Section 10 (b) as the Board concedes, confers a discretionary power upon the General Counsel to issue or refrain from issuing a complaint independently of any control or review by the Board.[7] Thus, if Section 10 (a) had in express language directed the Board to prevent all unfair labor practices affecting commerce, such a prescription would be rendered nugatory in those situations in which, under Section 10 (b), there had been an unreviewable refusal to issue a complaint and hence an impossibility of preventive action by the Board. Clearly therefore, the choice of language in the first sentence of Section 10 (a) does not compel an inference that it represents anything more than a grant and delimitation of the Board's jurisdiction, and its allegedly permissive form is nothing more than the means by which the Congress prevented subsections (a) and (b) from contradicting each other.

This conclusion is overwhelmingly corroborated

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[7]No issue is raised herein concerning the Board's discretionary power under the original Wagner Act, to decline to exercise an existent jurisdiction. Decisions under the original Act that the Board could in its discretion dismiss its own complaint which it alone had authority to issue are hardly relevant under the amended Act which was passed, inter alia, precisely with the objective of eliminating the Board's power over the issuance of complaints.

by the Congressional choice of language in subsection (c) which carries forward to the decisional stage the statutory scheme of Section 10 for the prevention of unfair labor practices. In this subsection the language is unambiguously mandatory. It provides that if, after a hearing the Board is of the opinion that unfair labor practices have been committed "The Board shall state its findings of fact[8] * * * and shall issue an order requiring such person to cease and desist from such unfair labor practice" (emphasis added). Clearly, a Congressional intent that the provisions of the first sentence of Section 10 (a) are genuinely permissive rather than mandatory could have been easily manifested by framing Section 10 (c) in language consistent with such intent. For example, if the relevant provisions of Section 10 (c) had read that the Board is "empowered" or "shall have power" to state it findings of fact and to issue cease and desist orders, the Board's assertion of the discretionary character of the authority allegedly conferred upon it by Section 10 (a) might have been more persuasive. To accept the Board's construction of the statute in this respect would be to nullify the inte-

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[8]See Jacobsen v. N.L.R.B., 120 F. 2d 96, 101 (C.A. 3) where the court held that the Board had the duty to decide whether the operations of the employer affected commerce, and in the words of the court remanding the cause

. . . and if it be found that the operations of [the employer] do affect commerce within the purview of the Act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto.

grated statutory scheme for the prevention of unfair labor practices established by Section 10, and hence should be avoided. United States v. Raynor, 302 U.S. 540, 547. See also McDonald v. Thompson, 305 U.S. 263, 266; United States v. American Trucking Ass'ns, supra at 544.

The General Counsel makes no claim to a right or desire to invade the judicial field of the Agency which is the Board's exclusive bailiwick. And like the Board, he does not believe it was the intent of Congress that the prosecutor should attempt to get over into that area any more than it was the intent of Congress that the judicial branch of the Agency should attempt to usurp those functions intended to be performed by the prosecutor and administrator.

The General Counsel does, however, assert that the policy and limitations and means to effectuate those things are to be found solely in the provisions of the Act and other related legislation enacted by the Congress—and that they are not to be found in some unidentified region where they carry on a mysterious existence independent of the statute that gave them being.

The General Counsel recognizes that the Congress has imposed a joint obligation on him and the Board, to carry out the prescriptions of the Act, and in so doing, to effectuate its policy. It is his desire here to emphasize the coordinate character of that obligation, but in so doing, he must conform to the duties, obligations, and responsibilities fixed on him by the specific language of the Act and by

the only reasonable inferences to be drawn therefrom.

/s/ ROBERT N. DENMAN,
General Counsel.

June 16, 1949.

United States of America
Before the National Labor Relations Board
Case No. 21-CB-34

In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, Secretary-Treasurer, and ALBERT E. MORGAN, Business Agent,
and
H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

ORDER DENYING MOTION

The Board having, on May 13, 1949, issued a Decision and Order in the above-entitled proceeding, and thereafter, the General Counsel for the National Labor Relations Board having filed a Motion for reconsideration of the aforesaid Decision and Order,

It Is Hereby Ordered that the said Motion be, and it hereby is, denied for reasons stated in the said Decision and Order.

Dated, Washington, D. C., June 30, 1949.

By direction of the Board:

/s/ FRANK M. KLEILER,
Executive Secretary.

GENERAL COUNSEL'S EXHIBIT No. 1

NLRB 508
(10-20-47)

United States of America
National Labor Relations Board
Amended Charge Against Labor Organization
or Its Agents

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that .....

.....

(Name of labor organization or its agents.)

.....at .....

has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) subsections ..... of said Act, in that: (Recite in detail in paragraph 2 the basis of the charge. Be specific as to names, addresses, plants, dates, places, and other relevant facts.)

2. .....

.....

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. Name of Employer: H. W. Smith d/b/a A-1 Photo Service.

4. Location of plant involved: 1306 S. Pacific Ave., San Pedro, Cal.; Employing 5.

5. Nature of business.....

Exhibit No. 1—(Continued)

6. (Paragraphs 6, 7, and 8 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f)(A), 9(f)(B)(1), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number..... The financial data filed with the Secretary of Labor is for the fiscal year ending..... A Certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

7. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.

8. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

H. W. Smith d/b/a A-1 Photo Service.

1306 S. Pacific Avenue, San Pedro, California, TErminal 2-1787.

By /s/ JOHN BAILEY,
Attorney.

Case No. 21-CB-34.

Date filed 4-5-48.

9(f), (g), (h) cleared.....

Subscribed and sworn to before me this 5th day of April, 1948, at Los Angeles, Calif., as true to the best of deponent's knowledge, information and belief.

/s/ EUGENE M. PURVER,
Board Agent.

(Submit Original and Four Copies of This Charge)

United States of America, Before the National Labor Relations Board, Twenty-first Region

Case No. 21-CB-34

In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, Secretary-Treasurer, and ALBERT E. MORGAN, Business agent,

and

H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

COMPLAINT

It having been charged by H. W. Smith, d/b/a A-1 Photo Service, hereinafter called the Employer, that Local 905 of the Retail Clerks International Association (AFL), hereinafter called Local 905,

Exhibit No. 1—(Continued)

Haskell Tidwell, Secretary-Treasurer of Local 905, and Albert E. Morgan, Business Agent of Local 905, have engaged in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101—80th Congress, First Session, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-First Region, designated by the Board's rules and regulations, Series 5, Section 203.15, hereby issues this Complaint and alleges as follows:

I.

H. W. Smith, d/b/a A-1 Photo Service, with his principal place of business at San Pedro, California, is now and at all times material herein, has been continuously engaged at said location in San Pedro, California, in the business of photo finishing and the sale and distribution of photographic equipment, supplies, accessories and various printed products.

II.

The Employer, in the course and conduct of his business, as aforesaid, causes and has continuously caused a substantial amount of equipment, materials, supplies and printed products to be acquired, purchased, transported and delivered in interstate

Exhibit No. 1—(Continued)

commerce from and through states of the United States other than the State of California to the Employer's place of business in San Pedro, California, and has continuously for a long period of time caused quantities of his finished products to be transported in interstate commerce from his place of business in San Pedro, California, to and through states of the United States other than the State of California.

III.

The Employer is, and at all times material herein, has been engaged in commerce within the meaning of the Act.

IV.

Local 905 of the Retail Clerks International Association (AFL) is a labor organization within the meaning of Section 2, Subsection 5, of the Act.

V.

Haskell Tidwell is Secretary-Treasurer of Local 905 of the Retail Clerks International Association (AFL).

VI.

Albert E. Morgan is business agent of Local 905 of the Retail Clerks International Association (AFL).

Exhibit No. 1—(Continued)

VII.

All clerical employees excluding supervisory employees employed by the Employer at his place of business in San Pedro, California, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, Subsection (b) of the Act in order that the employees of the Employer may have the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act.

VIII.

On and before November 1, 1947, all of the employees employed by the Employer in the unit described in Paragraph VII above designated Local 905 as their representative for the purposes of collective bargaining with the Employer.

IX.

At all times since November 1, 1947, Local 905 has been the representative for the purposes of collective bargaining of a majority of the employees of the Employer in the unit described in Paragraph VII above and by virtue of Section 9, Subsection (a) of the Act has been and is now the exclusive representative of all the employees of the Employer in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

Exhibit No. 1—(Continued)

X.

Local 905, although duly requested by the Employer, has at all times since on or about November 1, 1947, refused and continues to refuse to bargain collectively in good faith with the Employer in respect to rates of pay, wages, hours of employment or other conditions of employment of the employees of the Company in the unit set forth in Paragraph VII above.

XI.

Local 905, its officers, agents, organizers and representatives, respectfully and specifically including but not limited to Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, from on or about November 1, 1947, and continuously down to and including the date of issuance of this Complaint, restrained, coerced and are restraining and coercing employees of the Employer in the exercise of the rights guaranteed in Section 7 of the Act by:

(1) Refusing to bargain collectively in good faith with the Employer as alleged in Paragraph X.

(2) Attempting to impose and imposing upon employees of the Employer certain conditions of employment requiring said employees as a condition of employment to obtain and maintain membership in Local 905 in contravention of the Act.

Exhibit No. 1—(Continued)

XII.

Local 905, by its officers, agents, organizers and representatives, respectively, and specifically but not limited to Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, from on or about November 1, 1947, and continuously down to and including the date of the issuance of this Complaint, has attempted and continues to attempt to cause the Employer to discriminate against its employees by insisting and seeking to compel the Employer to establish and maintain a closed shop and thus require all the employees within the bargaining unit of which Local 905 is the collective bargaining representative to be and remain members of Local 905 as a condition of employment.

XIII.

Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, by their refusal to bargain collectively in good faith with the Employer as described in Paragraphs X, XI, and XII above, did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8, Subsections (b) (1) (A) and (3) of the Act.

XIV.

Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, by the acts

Exhibit No. 1—(Continued)

and conduct described in Paragraphs X, XI, XII and XIII above, did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8, Subsections (b) (1) (A) and (2) of the Act.

XV.

The activities of Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, as described in Paragraphs X, XI, and XII above, and each of them, appearing in connection with the operations of the Employer as described in Paragraphs I, II and III above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XVI.

The aforesaid acts of Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, and each of them, as hereinabove set forth, constitute unfair labor practices affecting commerce within the meaning of Section 8, Subsections (b) (1) (A), (2) and (3) and Section 2, Subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board on behalf of the Board, by the Acting Regional Director for the 21st Region,

Exhibit No. 1—(Continued)

on this 7th day of April, 1948, issues this Complaint against Local 905 of the Retail Clerks International Association (AFL), Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, Respondents herein.

[Seal] /s/ DANIEL J. HARRINGTON,
Acting Regional Director, National Labor Relations Board, Twenty-First Region.

[Endorsed]: No. 12446. United States Court of Appeals for the Ninth Circuit. H. W. Smith, doing business as A-1 Photo Service, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Review of Order of the National Labor Relations Board.

Filed February 14, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12446

H. W. SMITH, d/b/a A-1 PHOTO SERVICE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION TO REVIEW ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

H. W. Smith, an individual, respectfully petitions this Honorable Court for a review of a certain order entered on May 13, 1949, by the National Labor Relations Board (hereinafter referred to as the "Board") in a proceeding instituted by it against Local 905 of the Retail Clerks International Association, A. F. of L., Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, appearing and designated upon the records of the Board as "In the Matter of Local 905 of the Retail Clerks International Association, A. F. of L., Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, and H. W. Smith, d/b/a A-1 Photo Service, Case No. 21-CB-34."

In support of this petition, your petitioner respectfully shows:

I.

Jurisdiction of the Court

Your petitioner is and at all times herein mentioned was an individual doing business as A-1 Photo Service in the City of San Pedro, County of Los Angeles, State of California, at which place the unfair labor practices hereafter mentioned were committed, the same being within this circuit.

Petitioner on April 5, 1948, filed with the Regional Office of the National Labor Relations Board, Twenty-first Region, an amended charge alleging that the respondents in the above-mentioned matter had engaged in, and were engaging in, unfair labor practices affecting commerce under section 8(b)(1)(A), (2) and (3) and section 2(6) and (7) of the Labor Management Relations Act, 1947 (hereinafter referred to as the "Act"). The General Counsel of the Board, by the Acting Regional Director, Twenty-first Region, thereafter, pursuant to the final authority vested in him by section 3(d) of the Act, issued a complaint on April 7, 1948, against the said respondents in the above-mentioned matter alleging the matters contained in said charge. After hearing before a trial examiner on April 21, May 3, and May 4, 1948, and after transfer of the matter to the Board, by its order dated July 27, 1948, the said Board on May 13, 1949, issued the above-mentioned order dismissing the complaint, thereby denying to petitioner in whole the relief sought.

By reason of the above-mentioned matters, this

Court has jurisdiction of this petition by virtue of section 10(f) of the Labor Management Relations Act, 1947 (29 U.S.C.A. Sec. 160(f).)

II.

Facts and Pleading

The aforementioned charge filed by petitioner with the Regional Office, Twenty-first Region, of the National Labor Relations Board and the complaint issued pursuant thereto by the General Counsel of the Board alleged that the respondent union had been since before November 1, 1947, the duly designated collective bargaining representative of the petitioner's clerical employees, who constituted a unit appropriate for collective bargaining; that respondent union had at all times since November 1, 1947, refused to bargain collectively in good faith with petitioner though requested by petitioner to so bargain; that the respondent union and the individual respondents in said matter had since said date restrained and coerced employees of petitioner by said refusal to bargain and by further attempting to impose upon employees the requirement that they obtain membership in respondent union as a condition of employment; that all respondents had since said date attempted to cause petitioner to discriminate against his employees by seeking to compel petitioner to effect and maintain a closed shop. The complaint further alleged that petitioner was and is engaged in the business of photo finishing and the sale of photographic equip-

ment and supplies and causes a substantial amount of such merchandise to be transported and delivered to him in interstate commerce and likewise causes quantities of his finished product to be transported to his customers in interstate commerce and was, therefore, engaged in commerce within the meaning of the Act.

The findings of fact by the Trial Examiner were to the effect that during the period of April, 1947, to March, 1948, petitioner purchased merchandise of a value of $100,146.69 of which amount $44,406.63 was purchased outside the State of California and delivered to petitioner's store in San Pedro, California, in interstate commerce; that the rest of the merchandise purchased, of a value of $55,740.06 was purchased from sellers located in the State of California, most of which was delivered to petitioner from within the State of California; that a small portion of the latter purchases were shipped to petitioner from points outside the State of California; that of the merchandise delivered to petitioner from within California, a substantial portion originated from outside the State of California; that during the calendar year of 1947 petitioner's sales at his San Pedro store totaled $133,715.51; that all of said sales were sold and delivered to customers within the State of California except that merchandise valued at $600 was delivered to customers outside said State and merchandise valued at approximately $2400 was sold and delivered to installations of the United States mili-

tary and naval services; that petitioner is engaged in interstate commerce within the meaning of the Act; that the unfair labor practices of the respondents have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

With respect to the unfair labor practices charges, the Trial Examiner recommended: that the complaint be dismissed in so far as it alleged that respondent's conduct is demanding a closed shop contract was violative of section 8(b)(1)(A) of the Act; that the complaint be dismissed in so far as it alleged that the respondents named therein by insisting upon a closed shop contract had violated section 8(b)(2) of the Act; that the respondent union and respondent Tidwell refused to bargain collectively with petitioner in violation of section 8(b)(3) of the Act. Upon motion, the complaint was dismissed as to respondent Albert E. Morgan.

The Trial Examiner thereupon recommended that the remaining respondents named in said matter be ordered to cease and desist from refusing to bargain collectively with petitioner and to take certain affirmative action, that is, to bargain with petitioner upon his request and to post notices.

The Board, without giving consideration to the Trial Examiner's findings that the respondents named in said matter had committed unfair labor practices, and though agreeing with the Trial Ex-

aminer's finding that the petitioner's business constituted engagement in interstate commerce within the meaning of the Act, nevertheless held that it had the discretion to not accept such existing jurisdiction, and in the exercise of such asserted discretion, dismissed the complaint in its entirety on the grounds that "the assertion of jurisdiction would not effectuate the purposes of the Act." If the said dismissal was not upon that ground, then the Board did not disclose upon what ground the said dismissal was entered. Thereupon, the Board, on May 13, 1949, issued the order herein complained of, which was as follows:

"Order

"Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondents, Local 905 of the Retail Clerks International Association, A. F. of L., and Haskell Tidwell, Secretary-Treasurer, be, and it hereby is, dismissed."

The Board, in holding that it had the discretion to decline an admittedly existing jurisdiction, and in entering the aforementioned order upon such holding, committed error, in that the Board does not have discretion to decline such existing jurisdiction once a complaint has issued on the matter and the Board has taken jurisdiction thereof, all

of which was urged to the Board without avail. If the said decision and order was not on such ground, then the Board committed error in that it did not reveal, as it is obligated in law to do, the grounds upon which it acted and based its order.

The order of the Board adversely and irreparably affects, damages and aggrieves petitioner in that petitioner was thereby denied in whole the relief sought by the amended charge filed by him on April 5, 1948, as narrated above, and petitioner alleges that he is further aggrieved by the above-mentioned order of the Board in that the respondents in the proceedings before the Board are still the representatives of the employees of petitioner, and such respondents and representatives are still insisting that petitioner give effect to a closed-shop agreement which is invalid under the Act, and in that petitioner cannot determine from the decision and order of the Board whether the said Act is applicable to him or whether he may or may not properly execute and give effect to such agreement; and petitioner is further aggrieved by the said order of the Board in that it fails to prohibit the said respondents from engaging in conduct toward petitioner which is declared by the Act to be illegal.

Wherefore, H. W. Smith petitions this Honorable Court for a review of the aforementioned order entered by the Board in the aforementioned proceedings and your petitioner Respectfully Prays:

1. That the Board be directed to certify and deliver to this Honorable Court, or to petitioner, a transcript of the entire record in the aforementioned proceeding before the Board.

2. That the aforesaid order of the Board be set aside and the matter be remanded to the Board with instructions to accept jurisdiction if it exists in fact, to decide the matter upon its merits, and, if it finds that the said unfair labor practices were committed, to order the cessation and termination of such unfair labor practices and to give such further relief as will effectuate the policies of the Act.

Dated: December 30, 1949.

Respectfully submitted,
H. W. SMITH,
Doing Business as A-1 Photo Service,
Petitioner,

By /s/ J. STUART NEARY,
Attorney for Petitioner.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
Of Counsel.

Certificate

I hereby certify that I have examined the foregoing Petition and that the facts therein cited are true and correct and that in my opinion the said

Petition is well founded and that the prayer of the petitioner should be granted by this Court.

/s/ J. STUART NEARY,
Attorney for Petitioner.

Affidavit of service attached.

[Endorsed]: Filed January 3, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER WILL RELY

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

H. W. Smith, the petitioner in the above-entitled proceedings, in compliance with Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit certifies the following points to be relied upon in the review of the subject Order of the National Labor Relations Board:

A

1. That while holding that it had jurisdiction in fact within the meaning of the Act because of Petitioner's purchases and sales in interstate commerce, the National Labor Relations Board further held that Petitioner's business was essentially local, that the interruption of such business by labor disputes would have an insubstantial effect on com-

merce, that it had a discretionary power and authority to dismiss a complaint and proceedings properly initiated previous thereto by the General Counsel or his agent, that under this asserted discretion it could and did decline to exercise an existing jurisdiction which had been properly invoked by the General Counsel's filing and initiation of a complaint against the parties charged.

2. That the National Labor Relations Board does not have such discretion or authority with respect to the dismissal of complaints, which have been properly filed and initiated by the General Counsel, jurisdiction in fact existing.

3. That pursuant to Section 3 (d) of the Act the issuance of a complaint by the General Counsel or his agents is not subject to review by the Board.

4. That the Board, as an administrative agency, does not have the discretion and authority to decline to assert an existing jurisdiction, once such jurisdiction has been properly invoked and initiated.

B

If the order of the Board is held to have been issued without a decision or finding by the Board that jurisdiction in fact did or did not exist, the Board failing to make such finding of jurisdiction because under its asserted discretionary authority to dismiss the complaint and proceedings the existence of jurisdiction would not in either event be material, then Petitioner certifies the following

points to be relied upon in the review of the subject order of the National Labor Relations Board:

1. That the National Labor Relations Board does not have such discretion or authority with respect to the dismissal of complaints which have been properly filed and initiated by the General Counsel if the Board finds that jurisdiction in fact exists, and therefore the failure to find whether such jurisdiction did or did not exist is error.

2. That pursuant to Section 3 (d) of the Act the issuance of a complaint by the General Counsel or his agents is not subject to review by the Board if jurisdiction in fact exists and the Board in dismissing the complaint without making any finding as to whether jurisdiction in fact did exist committed error as it does not have discretion or authority to dismiss such a complaint if jurisdiction in fact exists.

3. That the Board, as an administrative agency, does not have the discretion and authority to decline to assert an existing jurisdiction, once such jurisdiction has been invoked and initiated, and the Board committed error therefore in failing to decide whether jurisdiction in fact existed.

4. That the Board in holding that it was not necessary for it to decide whether jurisdiction in fact exists since in either event it would dismiss the complaint and proceedings pursuant to its asserted discretion for policy reasons committed error in that the Board must disclose the specific grounds

upon which its order is based and may not base an order upon an alternative finding of the type described.

Dated: March 9, 1950.

Respectfully requested,
GIBSON, DUNN &
CRUTCHER,
Attorneys for Petitioner,
H. W. SMITH.

/s/ WILLIAM F. SPALDING,
Of Counsel.

[Title of Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

The Petitioner in the above-entitled proceedings hereby designates the following portions of the record to be printed:

1. The following portions only of General Counsel's Exhibit No. 1:

(a) Amended Charge Against Labor Organization or Its Agents, Case No. 21-CB-34, filed and subscribed on April 5, 1948, by John Binkley, attorney.

(b) The Complaint in Case No. 21-CB-34, subscribed April 7, 1948, by Daniel J. Harrington, Acting Regional Director, National Labor Relations Board, Twenty-first Region.

2. Trial Examiner Greenberg's Intermediate Report dated July 19, 1948.

3. Union's exceptions to the Intermediate Report dated September 9, 1948.

4. General Counsel's exceptions to the Intermediate Report dated September 24, 1948.

5. Decision and Order of the National Labor Relations Board issued May 13, 1949.

6. General Counsel's Motion for Reconsideration by the Board of its Decision and Order dated June 16, 1949.

7. Board's Order denying motion of General Counsel for reconsideration of Decision and Order dated June 30, 1949.

Dated: March 9, 1950.

Respectfully requested,
GIBSON, DUNN &
CRUTCHER,
Attorneys for Petitioner,
H. W. SMITH.

/s/ WLLIAIM F. SPALDING,
Of Counsel.

Affidavit of service attached.

[Endorsed]: Filed March 10, 1950.